FEB 1 1980

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND, d/b/a
SIDNEY SPARKS, TRUSTEE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FINLEY L. EDMONDS
Post Office Box 2624
1515 Bank & Trust Tower
Corpus Christi, Texas 78403

Attorney for Petitioner
Orville E. Dennis

Of Counsel:

MEREDITH, DONNELL & EDMONDS
Post Office Box 2624
1515 Bank & Trust Tower
Corpus Christi, Texas 78403
512/888-5551

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Table of Authorities	II
Opinions Below	1
Jurisdiction	2
Question Presented for Review—	
Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ—	
I. The decision of the court of appeals allowing the Respondents to maintain their complaint brought under Title 42, United States Code, Section 1983, against Petitioner, a private individual, is contrary to the public interest sought to be protected by the doctrine of judicial immunity as applied by this court in Section 1983 cases.	7
II. The decision of the court of appeals to allow the Respondents to maintain their complaint under Title 42, United States Code, Section 1983, against Petitioner, conflicts with the established rule followed by a majority of the courts of appeals. This Court has not ruled on the issue. The conflict needs to be resolved by this Court because of the effect on the public policy behind the doctrine of judicial immunity.	18
Summary	22
Conclusion	23
Certificate of Service	24
Appendix—	
District Court's Order	A1
District Court's Judgment	A4
Court of Appeals per curiam opinion	A5
Court of Appeals opinion on rehearing en banc	A11
Court of Appeals Judgment	A41
Court of Appeals Order denying Petition for Rehearing	A43

TABLE OF AUTHORITIES

CASES	Page
Adickes v. Kress & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970)	10, 17
Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021	18
Birley v. California, 564 F.2d 849 (9th Cir. 1977)	19
Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 656 (1872)	7, 8, 9, 10, 14, 22
Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969)	19
Butz v. Economou, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978)	10
Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938)	17
Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973)	18
French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915	19
Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)	11
Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970)	19
Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965)	19
Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975)	19
Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976)	18
Hill v. McClellen, 490 F.2d 859 (5th Cir. 1974)	19
Humble v. Foreman, 563 F.2d 780 (5th Cir. 1977)	19
Kermit Construction Corporation v. Banco Credito y Ahorro Ponceno, 547 F.2d 1 (1976)	19, 20, 21
Kurz v. State of Michigan, 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. Reh. Den. 98 S.Ct. 1289	18, 19
Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109	19
Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967)	7, 9, 10, 11, 22
Rhodes v. Laurino, 444 F. Supp. 170 (E.D.N.Y. 1978)	19
Russell v. Town of Mamoroneck, 440 F. Supp. 607 (S.D. N.Y. 1977)	19
Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978)	9, 19
Sparkman v. McFarland, 601 F.2d 261 (7th Cir. 1979)	19, 20
Stump v. Sparkman, 435 U.S. 349, 364, 55 L.Ed.2d 331, 344, 98 S.Ct. 1099 (1978)	5, 7, 9, 10, 19, 21, 22
Sykes v. California Department of Motor Vehicles, 497 F.2d 197 (9th Cir. 1974)	19
United States v. Price, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966)	20, 21
Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975)	18
Winslow v. Duval County Ranch Company, 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.)	3

Page

CONSTITUTION AND STATUTES

Title 18, United States Code, Section 242 21
Title 42, United States Code, Section 1983 .....
.....2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 15, 16, 18, 20, 21, 22
Tex. Const. Art. XVI, Section 41 12
Tex. Penal Code, Section 36.02 12

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. _____

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND, d/b/a
SIDNEY SPARKS, TRUSTEE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Orville E. Dennis, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court's memorandum order is unreported. It is included in the Appendix contained herein at Page A1. The judgment of the District Court appears in the Appendix at Page A4.

The first opinion of the Court of Appeals, the per curiam panel opinion, is reported at 588 F.2d 124, and appears in the Appendix at page A5. The opinion

of the Court of Appeals on rehearing en banc is unreported, but is included in the Appendix at page A11. The judgment of the Court of Appeals appears in the Appendix at page A41. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis (Petitioner herein) appears in the Appendix at page A43.

JURISDICTION

The opinion of the Court of Appeals on rehearing en banc was filed on October 22, 1979. The judgment was entered on October 22, 1979. The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee Orville E. Dennis, Petitioner herein, was entered on December 14, 1979. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity.

STATUTE INVOLVED

The federal statute involved is Title 42, United States Code, Section 1983 [Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13], which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights
> Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

In the District Court below, the Respondents allege that a Texas state district court judge, O. P. Carrillo, conspired with certain private individuals, Duval County Ranch Company, Clinton Manges, Clarence Martens and Petitioner, Orville E. Dennis, to deprive Respondents of their civil rights. The complaint for damages was brought under 42 United States Code, Section 1983.

In the Respondents' amended complaint, the alleged conspiracy is described as involving the conduct of Duval County Ranch Company in suing the Respondents in state district court to wrongfully enjoin the Respondents from certain activity on an oil and gas lease, the judge's entry of a temporary injunction, and Martens' and Petitioner's signing as individual sureties on the bond required under state law for issuance of the temporary injunction. The temporary injunction was dissolved on appeal to a Texas appellate court. *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.).

The only allegations contained in the Amended Complaint as to Petitioner are the conclusory allegation that Petitioner "knew" about a conspiracy among the judge, Manges and Duval County Ranch Company to wrong-

fully injure the Respondents, and that Petitioner had participated in that conspiracy by signing the temporary injunction bond as an individual surety.

The District Court below, on motions to dismiss submitted by Petitioner and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under 42 U.S.C. Section 1983.

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Respondents would not have suffered the alleged injury.

Assuming the allegations in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against the Petitioner and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth

Circuit, the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including Petitioner. In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to 42 U.S.C. Section 1983 cases.

With respect to the private citizen defendants, including this Petitioner, the Court below held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under 42 U.S.C. Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed nor was any motion to stay issuance of the mandate filed. Then, on March 9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Petitioner and the other parties of its intent to reconsider en banc the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to a footnote, number 13, in a recent opinion of this Court, *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court

of Appeals affirmed the panel's holding that the state court judge was immune from suit, but reversed as to the private alleged co-conspirators.

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite action under color of state law. Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

This Petitioner filed a petition for rehearing and suggestion for rehearing en banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979. Upon Petitioner's motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS ALLOWING THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT BROUGHT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, A PRIVATE INDIVIDUAL, IS CONTRARY TO THE PUBLIC INTEREST SOUGHT TO BE PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY AS APPLIED BY THIS COURT IN SECTION 1983 CASES.

II.

THE DECISION OF THE COURT OF APPEALS TO ALLOW THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, CONFLICTS WITH THE ESTABLISHED RULE FOLLOWED BY A MAJORITY OF THE COURTS OF APPEALS. THIS COURT HAS NOT RULED ON THE ISSUE. THE CONFLICT NEEDS TO BE RESOLVED BY THIS COURT BECAUSE OF THE EFFECT ON THE PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

ARGUMENT AND AUTHORITIES

I.

THE DECISION OF THE COURT OF APPEALS ALLOWING THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT BROUGHT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, A PRIVATE INDIVIDUAL, IS CONTRARY TO THE PUBLIC INTEREST SOUGHT TO BE PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY AS APPLIED BY THIS COURT IN SECTION 1983 CASES.

The American public is best served by judges who are principled, highly motivated, and fearless in their decision-making. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed 656 (1872); *Pierson v. Ray,* 386 U.S. 547, 18 L. Ed.2d 288, 87 S.Ct. 1213 (1967); *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct.

1099 (1978). It was long ago recognized that it was in the public interest to protect judges from lawsuits brought complaining of their judicial decisions. *Bradley v. Fisher, supra.*

The purpose of the doctrine of judicial immunity is to enable judges to function in their duties ". . . without apprehension of personal consequences . . ." *Bradley v. Fisher,* 80 U.S. at 347. But the majority of the court of appeals below in the opinion on rehearing en banc would restrict the scope of the doctrine of judicial immunity to merely immunizing a judge from direct suit for money damages.

As expressed by this Court in the landmark decision in *Bradley v. Fisher, supra,* the concept of judicial immunity is important to preserve our system of jurisprudence. It is imperative that judges be immune from prosecution for their acts as judges.

What is the nature of the public purpose to be served by this doctrine? This Court emphasized in *Bradley* that the doctrine of judicial immunity is based upon sound public policy:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge,

> it would establish the weakness of judicial authority in a degrading responsibility . . .
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . ." *Bradley v. Fisher.* 80 U.S. at 347, 20 L.Ed. at 649-650.

Quoting from the case of *Floyd and Barker,* reported by Coke in 1608 (12 Coke 25), this Court in *Bradley* noted that if judges were subject to being questioned for their motives in their decisions as judges, such would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." *Bradley,* 80 U.S. at 348, 20 L. Ed. at 650.

In this Court's landmark decision in *Pierson v. Ray, supra,* this Court ruled that Congress, in enacting 42 U.S.C. Section 1983, did not intend to abolish the common law doctrine of judicial immunity. The Court has recently had the opportunity to reiterate that view in *Stump v. Sparkman, supra.*

This Court held in *Pierson* that the doctrine of judicial immunity is applicable in Section 1983 cases. This Court held that judges committing acts within their judicial jurisdiction are not "persons" liable under Section 1983.

Section 1983 makes no mention about private persons acting alone, nor about conspiracies between private citizens and state officials. It is settled that a private individual, acting alone, is not liable for damages under Section 1983. *Slavin v. Curry,* 575 F.2d 1256 (5th Cir.

1978). However, this Court has construed Section 1983 to encompass a conspiracy involving a private person and state officials if the private person was a "willful participant" in a conspiracy with agents or officials of the state. *Adickes v. Kress & Company,* 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

It is submitted that the doctrine of judicial immunity, as described by this Court in its opinions in *Bradley, Pierson,* and *Stump* is intended to do more than merely immunize a judge from personal liability for money damages.

The public policy enunciated in *Bradley* requires that a judge be free to make decisions within his jurisdiction "without apprehension of personal consequences to himself". *Bradley,* 80 U.S. at 347.

To insure that the public interest in a fearless judiciary is served, the doctrine immunizes judges from civil lawsuits concerning the motives behind their decisions. *Butz v. Economou,* 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978).

Should the doctrine of judicial immunity be narrowly construed to prohibit only direct suit against a judge, but to allow suit against the private co-conspirators in which the judge's motives and conduct would be in question? Petitioner submits that this Court has given a broader meaning to a judge's immunity. In *Pierson,* it was said:

> "His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute

> not to principled and fearless decision-making, but to intimidation." *Pierson*, 386 U.S. at 554, 18 L.Ed. 2d at 294-295.

The majority below has misconstrued the scope of the doctrine. They would have us believe that the harrassment and intimidation to be avoided arises only out of a direct suit against a judge. But what of a suit against persons with whom the judge is alleged to have conspired?

Contrary to the majority's narrow construction, the doctrine bars more than liability for money damages, it bars the trial itself. The doctrine is not merely a defense to be raised by a judge at trial. According to Judge Learned Hand, this is justified, because ". . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949).

Again quoting from this Court's opinion in *Pierson:*

> "This immunity . . . 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their function with independence and without fear of consequences.' " (citations omitted). *Pierson,* 386 U.S. at 554, 87 S.Ct. at 1218, 18 L.Ed. at 294.

Given the foregoing, it is submitted that the reasoning of the majority below conflicts with the purpose to be served by the doctrine of judicial immunity by too narrowly defining the scope of the doctrine. The majority

would retain the immunity of the judge from a direct lawsuit as a party defendant. But the majority would allow a lawsuit under Section 1983 against the alleged private co-conspirators. The attempt of the majority to draw a distinction here is logically misleading.

The majority's policy argument is that the harm from prohibiting an action against the private conspirators is greater than the harm resulting to the judiciary from permitting those actions.

What is the harm resulting from the majority rule? It is that the Respondents would be deprived of a remedy under federal law (42 U.S.C. Section 1983) which is cumulative of remedies available to them under Texas law.

There are both criminal and civil remedies provided under Texas law for the alleged complaint of the Respondents here. In Texas, persons injured by the wrongful issuance of an injunction can sue the private "conspirators" for damages. As a matter of fact, that is exactly what the Respondents have done. They have filed a suit seeking pecuniary damages now pending in the 229th Judicial District Court in Duval County, Texas: Cause No. 9524, "Sidney A. Sparks, Trustee vs. Duval County Ranch Co., et al."

There are criminal sanctions under Texas law for the kind of conduct alleged against the private individuals, involving bribery of a state official. Tex. Const. Art. XVI, Section 41; Tex. Penal Code, Section 36.02.

What is the harm from the minority rule espoused by the court below? Essentially, the minority rule permits a collateral attack on the judge's action. It permits indirect-

ly what the doctrine of judicial immunity prohibits. See the dissent below, Appendix at page A28.

First, the judge's involvement is unavoidable in a Section 1983 claim brought against only the private co-conspirators. To establish the plaintiff's case against the defendants, the plaintiff must raise the issue of the judge's alleged participation, his actions and motives. He must show that the judge participated in the conspiracy to deprive him of his civil rights. He must prove the judge's participation in order to establish the requisite state action under Section 1983.

Even though the plaintiff cannot directly force the judge to participate by making him a defendant, the plaintiff can intimidate and harass the judge merely by being able to bring the lawsuit under Section 1983 against others involved in the state court case.

Second, if judicial immunity protects the judge but suit is permitted against his alleged co-conspirators, the judge becomes the primary and principal witness for the defense against all charges brought against the co-conspirators. The unprotected co-conspirator may have to build his case around the testimony and statements of the involved judge. For an effective defense, the alleged co-conspirators will be compelled to subject the judge to certain discovery procedures and pre-trial practices so that all facts and legal issues can be developed. The judge might be subjected to testifying in trial and being required to explain his conduct, motives and sincerity to another judge and jury. Such actions will require a judge to become involved in the co-conspirator's defense and such actions will cause the judge to be diverted from his judicial position and responsibilities.

Is this what the public interest demands? Absolutely not. The public interest demands that a judge be free to act upon his own convictions without liability, fear or duty to answer to every person who feels aggrieved by the action or involvement of a judge. This Court stated in *Bradley v. Fisher, supra,* that "the public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions." 80 U.S. at 349.

Third, the possibility of a judge being involved in the defense or prosecution of a private person on alleged conspiracy charges and the possibility of a judge being required to testify in such matters cause to be focused upon his judicial integrity. If there is anything the public demands and a judge should honor, it is his integrity as a judge and the effect of his integrity upon the judicial system as a whole. The public demands that a judge avoid evil or even the appearance of it. Yet, how can he maintain such integrity when he can still be made to submit to discovery, testify at trial and have his honor questioned. Unless the judge voluntarily enters the lawsuit as a defendant and waives his right of judicial immunity, he has no right to question his accusers. He is not even assured the right to remain in the courtroom to hear the testimony of the witnesses. To defend himself, his name, his honor, and his integrity, the judge is forced to waive his immunity or to enter the case voluntarily as a defendant. If this occurs, then the very rationale for the doctrine of judicial immunity has been undercut.

Fourth, public policy requires that the door to federal court not be opened wide to every aggrieved liti-

gant in a state court proceeding. Anyone dissatisfied with the result of the litigation in a state court can allege a conspiracy sufficient to obtain federal court review of his claim. Every trial in a state court, criminal or civil, carries the potential for a claim that the judge and other participants in the proceeding acted in knowing concert to deny federal rights. In this way, the judicial system can be abused and the opportunities for continually involving the judge in such litigation can effectively prevent the judge from exercising his responsibilities as a judicial officer.

Fifth, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before getting involved in certain legal activities. This is very important since it can be presumed that if the action is unconstitutional, the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. If the seeking of aid from a judicial officer is ever challenged as a conspiracy, then the seeking of aid or assistance from the judiciary by private persons will be stifled and discouraged because of the unavailability of judicial immunity protection. This certainly runs in opposition to the public's interest and needs.

As indicated, there exists imperative public policy reasons for the doctrine that a private citizen should not be held liable for damages when he or she is alleged to be a co-conspirator with a judge who is immune from such actions as a Section 1983 claim. The doctrine of judicial immunity should not be so eroded. If so, the judicial role is abrogated and forced to focus upon duties removed from a judge's responsibility.

A judicial officer should be free to act upon his own beliefs ". . . without apprehension of personal consequence . . ." to himself. If this "back door" approach of the court below is sustained, then the judicial officer can be prevented from acting upon his own beliefs and the personal consequence to himself will still exist.

Furthermore, the risks of widening the door to increased litigation to the detriment of the judicial system becomes imminent and the public may be discouraged from seeking any judicial assistance. Such harms are of sufficient concern for this Court to review the role of judicial immunity and correct the lower court's error to insure that the doctrine is clarified and utilized in a uniform way throughout the federal judiciary.

To say that the consequences of allowing prosecution of suits against the alleged co-conspirators will be inconsequential is contradicted by the lower court's knowledge of the many "jailhouse lawyer" lawsuits and writs filed with the federal district courts and with the Fifth Circuit itself. The present burden of these suits was noted by the attorneys and by the members of the lower court during the panel argument and the argument on rehearing.

One need only consider the number of reported cases under Section 1983 involving judges of various jurisdictions, criminal and civil, judges who allegedly acted with improper motives and judges who have allegedly grievously erred. Disgruntled litigants have not been reluctant to try to take on their judges through the vehicle of a Section 1983 suit in federal court.

The fallacy of the reasoning of the majority below is illustrated in its discussions of *Adickes* and *Farnsworth* (Appendix at pages A20-A24). *Adickes v. Kress & Co., supra; Farnsworth v. Zerbst,* 98 F.2d 541 (5th Cir. 1938). *Adickes* is cited in support of the majority's holding that the private conspirators can be sued without joining the state official as a defendant. *Farnsworth* is cited in support of the majority's holding that the private conspirators can be sued despite the immunity from suit of a co-conspirator.

As to both, the majority misses the distinction critical to a resolution of the instant case. Here, too, the state official is immune from suit. But the distinction lies in the nature of his immunity and the effect on that immunity of allowing suit against the private co-conspirators.

Allowing the private conspirators in *Adickes* to be sued, without the state official, did not compromise the rationale for the policeman's qualified immunity. Allowing the non-immune individuals in *Farnsworth* to be sued, without the immune foreign diplomat, did not compromise the rationale for diplomatic immunity.

Neither case involved a judge. Neither case involved the concept of judicial immunity. As explained above, a judge's immunity is a special concept and until now absolute in civil cases. But it will be undermined if suit is allowed against the judge's alleged co-conspirators.

II.

THE DECISION OF THE COURT OF APPEALS TO ALLOW THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, CONFLICTS WITH THE ESTABLISHED RULE FOLLOWED BY A MAJORITY OF THE COURTS OF APPEALS. THIS COURT HAS NOT RULED ON THE ISSUE. THE CONFLICT NEEDS TO BE RESOLVED BY THIS COURT BECAUSE OF THE EFFECT ON THE PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

The majority decision below is a reversal of a firmly established position in the Court of Appeals for the Fifth Circuit. The decision on rehearing now places the Fifth Circuit alongside the First Circuit as a minority of circuits espousing the belief that Section 1983 suits against a judge's co-conspirators should be allowed.

In a majority of the courts of appeals which have considered the issue here, the rule is and has been that no cause of action can be stated under Section 1983 against a private citizen who has allegedly conspired with a state court judge who is himself immune from prosecution under Section 1983 because of the doctrine of judicial immunity. The rule has been followed by the Third Circuit in *Hazo v. Geltz,* 537 F.2d 747 (3rd Cir. 1976), *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975) and *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021; by the Fourth Circuit in *Fowler v. Alexander,* 478 F.2d 694 (4th Cir. 1973); by the Sixth Circuit in *Kurz v. State of Michigan,* 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972,

U.S. Reh.Den. 98 S.Ct. 1289; by the Seventh Circuit in *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975), *French v. Corrigan,* 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915, and *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969); and by the Ninth Circuit in *Haldane v. Chagnon,* 345 F.2d 601 (9th Cir. 1965), *Sykes v. California Department of Motor Vehicles,* 497 F.2d 197 (9th Cir. 1974), and *Birley v. California,* 564 F.2d 849 (9th Cir. 1977).

In the Second Circuit, this majority rule was followed in *Russell v. Town of Mamoroneck,* 440 F. Supp. 607 (S.D.N.Y. 1977) and *Rhodes v. Laurino,* 444 F.Supp. 170 (E.D.N.Y. 1978).

The majority rule had been followed by the Fifth Circuit for a decade: *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970); *Hill v. McClellen,* 490 F.2d 859 (5th Cir. 1974); *Humble v. Foreman,* 563 F.2d 780 (5th Cir. 1977); *Perez v. Borchers,* 567 F.2d 285 (5th Cir. 1978), cert. den. 99 S.Ct. 109; *Slavin v. Curry,* 575 F.2d 1256 (5th Cir. 1978).

Until the decision on rehearing below, the exception among the circuits was the decision of the Court of Appeals for the First Circuit in *Kermit Construction Corporation v. Banco Credito y Ahorro Ponceno,* 546 F.2d 1 (1976).

As the dissent in the opinion below notes, the position of the Seventh Circuit is now unclear because of the highly fractionated en banc opinion in *Sparkman v. McFarland,* 601 F.2d 261 (7th Cir. 1979). Appendix, n. 5, page A33. After this Court's decision in *Stump v. Sparkman, supra,* the subject issue of whether a claim can be

stated against the co-conspirators was submitted on remand to the Seventh Circuit in *Sparkman v. McFarland.*

The en banc opinion in *Sparkman v. McFarland* consists of a per curiam order and four concurring opinions. The Court of Appeals for the Seventh Circuit affirmed the distrtict court's dismissal of the Section 1983 conspiracy claim against the private defendants after the state judge was held to be immune. Two judges were of the opinion that the issue was not properly before the court. Three judges would allow Section 1983 suits even when the state actor is immune, but they would impose on the plaintitff the burden of a particularized pleading requirement.

Until the decision below on rehearing, the First Circuit stood alone as having squarely met the subject issue and having allowed the Section 1983 claim against the private conspirators. In *Kermit* the court attempted to premise its holding on this Court's opinion in *United States v. Price,* 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966). However, in reality, the court's decision was based on semantics, much like that of the court below. It reasoned that, immune or not, the state official provided the requisite state action. Anyone conspiring with that state official was therefore acting under color of state law. *Kermit,* 547 F.2d at 3.

Kermit does not even involve a state judge. *Kermit* involved a Section 1983 action brought against a bank, a construction corporation, and a court-appointed receiver. It was alleged that all of the defendants conspired to put the corporation into receivership and avoid paying a debt to the appellant. The court explained that the receiver should share a judge's judicial immunity. The court

further held that the remaining private defendants could not "seek shelter of judicial immunity" even though the receiver was himself immune.

In regard to *United States v. Price, supra,* the only authority cited by *Kermit,* that case is distinguishable from the instant case in several respects. It did not involve a judge as an alleged co-conspirator. It did not involve the effect of judicial immunity on the liabilitty of private co-conspirators under Section 1983. Instead, it involved 18 U.S.C.A. Section 242, a criminal statute. However, the Supreme Court refers to Section 1983 as the civil counterpart to said Section 242. And finally, *Price* involves outrageous and criminal conduct, clearly outside the scope of any acknowledged immunity, i.e. murder.

Kermit notwithstanding, the majority opinion below meets square on the public policy reasons for the majority rule. It is this attempt to weaken the doctrine of judicial immunity in Section 1983 cases which should be corrected by this Court.

This Court has previously noted the split of authority on this issue. *Stump v. Sparkman,* n. 13, 435 U.S. at 364; 55 L.Ed.2d at 344. We have not found any opinions by this Court in which this issue was squarely before the Court. There now exists inconsistent views regarding judicial immunity and private citizen conspirators, and there exists competing and conflicting decisions among the various courts of appeals. To achieve uniformity among the federal courts of appeals, it is respectfully submitted that this Court should review, clarify and decide this issue. As was encouraged by the dissent in the opinion on rehearing below, ". . . we suggest that this decision

will not be the last word on this subject, and we respectfully dissent." Appendix, page A40.

SUMMARY

Presented in this Petition is an issue of paramount importance to the public interest. It should be clear from this Court's opinions in *Bradley, Pierson* and *Stump* that judicial immunity is more than mere immunity from liability for pecuniary damages. As stated in *Bradley,* it is immunity from ". . . apprehension of personal consequences . . ." to the judge. It is intended to shelter the judge from intimidation and harassment. As discussed above, the judge is threatened as much from a collateral attack as he is from a direct suit against him.

However, the majority of the court below would confine the scope of judicial immunity in Section 1983 cases. That majority has adopted a minority viewpoint, which conflicts with the viewpoint of all but one of the circuits which have had the opportunity to consider the issue.

Simply stated, the illogic of the view espoused by the court below conflicts with the purpose of judicial immunity in Section 1983 cases.

It is respectfully submitted that the Supreme Court should exercise its power of supervision over the federal circuit courts and resolve the issue in favor of the doctrine of judicial immunity. Public policy is best served by the majority rule among the circuit courts. It is not in the public interest to sacrifice the doctrine of judicial immunity to extend in one case to a complainant a federal remedy which is cumulative of other adequate remedies.

CONCLUSION

For the reasons set forth above, Petitioner, Orville E. Dennis, prays that this Court enter its Order directing that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit below, and upon such review that this Court reverse the judgment below insofar as it reverses the district court's dismissal of the complaint against Petitioner and the other defendants below, and that this Court affirm the judgment of the district court below dismissing the complaint against this Petitioner and the other defendants below.

Respectfully submitted,

ORVILLE E. DENNIS, *Petitioner*

By: _____

FINLEY L. EDMONDS
Post Office Box 2624
1515 Bank & Trust Tower
Corpus Christi, Texas 78403
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, #5 Northwood, Del Mar Hills, Laredo, Texas; Mr. Raul Garcia, 208 N. Cameron, Alice, Texas 78332; and Hon. Mark White, Attorney General, P.O. Box 12548, Austin, Texas 78711, Attn: Ms. Laura Martin, Asst. Attorney General; on the _____ day of January, 1980.

FINLEY L. EDMONDS
P.O. Box 2624
1515 Bank & Trust Tower
Corpus Christi, Texas 78403

APPENDIX

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. 76-C-2

SIDNEY A. SPARKS, ET AL.

V.

DUVAL COUNTY RANCH COMPANY, ET AL.

Filed: December 17, 1976

ORDER

Plaintiffs brought this suit pursuant to 42 U.S.C § 1983, alleging damages as a result of Defendant O. P. Carrillo's entry of an injunctive order against Plaintiffs. Carrillo had been judge of the 229th District Court of Duval County, Texas, when he entered an order enjoining production of minerals from certain leases owned by Plaintiffs. Plaintiffs joined all other Defendants as co-conspirators in the alleged plan to deprive Plaintiffs of their civil rights.

Defendant Carrillo has moved for dismissal of this action, asserting the doctrine of judicial immunity as basis for his motion. All other Defendants assert Carrillo's immunity and urge that, because of such immunity, no state action claim can be asserted.

The doctrine of judicial immunity is deeply engrained in our jurisprudence. Generally, immunity extends to

those judicial acts done within the judge's jurisdiction. *Pierson v. Ray,* 386 U.S. 547 (1966). Civil rights suits are also subject to a claim of judicial immunity. *Pierson, supra,* at 554. In *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974), the Fifth Circuit stated that judges are immune if "acting within their jurisdiction and authority." *Hill, supra,* at 860. It is clear that Carrillo's action of entering an injunction was a judicial act within his authority, and the land in question was within his jurisdiction.

Even if an order is entered "maliciously or corruptly," judicial immunity applies. *Cadena v. Peraso,* 498 F.2d 383 (9th Cir. 1974). A footnote in the Supreme Court's decision in *Pierson, supra,* stated: "Petitioner attempted to suggest a 'conspiracy' between Judge Spencer and the police officers by questioning him about his reasons for finding Petitioner guilty . . . . The proof of conspiracy never went beyond this suggestion that inferences could be drawn from . . . judicial decisions." *Pierson, supra,* at note 8, pp. 553-54. Plaintiffs contend that a conspiracy did exist in their case. The Fifth Circuit has recently dealt with the question of judicial immunity in a conspiracy charge, and has rejected the suggestion of *Pierson* that an alleged judicial conspiracy could remove immunity. In *Smart v. Jones,* 530 F.2d 64 (5th Cir. 1976), the Court held that immunity applied even where a conspiracy was alleged, and dismissed the charges. This Court therefore concludes that Defendant Carrillo is immune from liability in this action and his motion to dismiss must be granted.

The removal of Defendant Carrillo from this case effectively destroys a claim founded on 42 U.S.C. § 1983.

In *Haldane v. Chagnow,* 345 F.2d 600 (9th Cir. 1965), a conspiracy involving a judge was alleged in a § 1983 suit. That Court found that the defendant judges enjoyed immunity from suit. The Court held that "with the elimination of the defendant judges and bailiff from the case, claims against [the other defendants] under the Civil Rights Act" could not be stated.

> "The [other defendants] were not State officers and they did not act in conspiracy with a state officer against whom appellant could state a valid claim. It follows that they did not and could not commit the alleged wrongful acts 'under color of state law or authority.'" *Haldane, supra,* at 604.

Therefore, the claims against the remaining Defendants must also be dismissed for failure to state a claim upon which relief can be granted.

The motions of Defendants Duval County Ranch Company, Inc., Clinton Manges, Clarence Martens, Orville E. Dennis, and O. P. Carrillo to dismiss are hereby granted.

IT IS SO ORDERED.

SIGNED this 17th day of December, 1976.

/s/ OWEN D. COX
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CA. NO. 76-C-2

SIDNEY A. SPARKS, ET AL.

V.

DUVAL COUNTY RANCH COMPANY, ET AL.

Filed: December 20, 1976

JUDGMENT

For the reasons stated in this Court's memorandum and order entered on December 17, 1976, this case is hereby dismissed.

IT IS SO ORDERED.

SIGNED this 20th day of December, 1976.

/s/ OWEN D. COX
United States District Judge

Sidney A. SPARKS, R. L. Lynd, d/b/a
Sidney A. Sparks, Trustee,
Plaintiffs-Appellants,

v.

DUVAL COUNTY RANCH
COMPANY, INC., et al.,
Defendants-Appellees.

No. 77-1249.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1979.

In an action against a former state court judge and other defendants, under the 1871 civil rights statute, the United States District Court for the Southern District of Texas at Corpus Christi, Owen D. Cox, J., dismissed the complaint. Plaintiffs appealed. The Court of Appeals held that: (1) the state court judge's act in entering a temporary injunction was protected by judicial immunity even if it was induced by a bribe from a party to suit, and (2) the state court judge being immune from liability, the remaining defendants, being all private citizens, did not conspire with any person against whom a valid claim could be stated under the 1871 civil rights statute, and thus the claim as against other defendants was also properly dismissed.

Affirmed.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

This case involves judicial immunity from liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983. For purposes of the motion to dismiss the complaint, we must assume that the judge in question accepted a bribe. Decisions of the Supreme Court and this Court require us to adhere to the doctrine of judicial immunity. Accordingly, we affirm the district court's dismissal of this action.

According to the complaint, the plaintiffs, trustees, operated oil and gas wells on land adjacent to property owned by the defendant Duval County Ranch Company, Inc. (DCRC), a corporation wholly owned by the defendant Clinton Manges. The complaint alleges that Manges entered into a conspiracy with the defendant O. P. Carrillo, who served as a judge of the 229th District Court of Duval County, Texas, from November 1970 to January 23, 1976, when he was removed from office by the Texas Senate.[1] Under the alleged conspiracy, Manges bestowed financial favors upon Carrillo, who in return would rule as Manges directed in cases before his court.

The complaint charges that, on August 15, 1972, Manges filed suit in Carrillo's court to enjoin the plain-

1. The Supreme Court of Texas also removed Carrillo from the bench. *See Matter of Carrillo*, 1976 Tex., 542 S.W.2d 105. According to the most recent submission in this case by the Attorney General of Texas, Carrillo is presently incarcerated in a federal penitentiary on income tax charges.

tiffs' oil production. Manges alleged that the plaintiffs' operations were polluting DCRC's land. According to the complaint, Manges's true motivation was to stop the plaintiffs' production and thereby cause their oil lease to be terminated under the nonproduction clause it contained. The complaint next asserts that, at Manges' direction, Carrillo entered an order on January 18, 1973, temporarily enjoining the plaintiffs' oil production. The defendants Clarence Martens and Orville Dennis served as sureties for the injunction bond. That temporary injunction remained in effect until June 25, 1975, when the Texas Court of Civil Appeals dissolved it. *Winslow v. Duval County Ranch Company,* 1975, Tex. Civ. App., 519 S.W.2d 217. The complaint asserts that, because of the conspiracy between Manges and Carrillo, the plaintiffs lost over two years of oil production on the land in question. The complaint states a claim under 42 U.S.C. § 1983 for the alleged conspiracy to deprive the plaintiffs of their oil production. The complaint also states a pendent state claim based on the alleged wrongful injunction.

The district court dismissed the complaint. It determined that judicial immunity barred suit against Carrillo and that, with the state judge eliminated as a defendant, there were no § 1983 claims under color of state law against the remaining defendants.

[1] Because we are reviewing a dismissal for failure to state a claim upon which relief can be granted, we must assume the existence of all facts pleaded in the complaint. The defendants argue that Carrillo's act in entering the temporary injunction is protected by judicial immunity

even if it had been induced by a bribe from Manges. We must agree.

Over a century ago, the Supreme Court embedded judicial immunity into our jurisprudence. In *Bradley v. Fisher,* 1872, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646, the Court stated that it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself". Therefore, the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly". 80 U.S. at 351. The Court drew a distinction between acts in excess of jurisdiction, which are protected by immunity, and acts in the clear absence of all jurisdiction, which are unprotected. The Court illustrated this distinction by stating that a probate judge with jurisdiction over only wills and the settlement of estates who tried a criminal case would be acting in clear absence of all jurisdiction, while a criminal court judge who convicted a defendant of a nonexistent crime would merely be acting in excess of jurisdiction. 80 U.S. at 351-52.

In *Pierson v. Ray,* 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288, the Court held that judicial immunity applied to suits under 42 U.S.C. § 1983:

> This immunity applies even when the judge is accused of acting maliciously and corruptly . . . . His errors may be corrected on appeal, but he should

> not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

386 U.S. at 554, 87 S.Ct. at 1218. The Court recently reaffirmed that a judge may be liable in a civil action only when his act was in the clear absence of all jurisdiction. *Stump v. Sparkman,* 1978, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331. *See also Imbler v. Pachtman,* 1976, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (prosecutorial immunity).[2]

[2, 3] Because it is clear that Carrillo had jurisdiction over the action filed by Manges against the plaintiffs, we must affirm the district court's determination that Carrillo's act in entering the temporary injunction was cloaked with judicial immunity.[3] Since Carrillo is im-

---

2. This Court has faithfully followed this line of cases by applying judicial immunity even when corrupt or otherwise intentionally wrongful judicial acts are alleged. *See Slavin v. Curry,* 5 Cir. 1978, 574 F.2d 1256; *Perez v. Borchers,* 5 Cir. 1978, 567 F.2d 285; *Humble v. Foreman,* 5 Cir. 1977, 563 F.2d 780; *Connor v. Pickett,* 5 Cir. 1977, 552 F.2d 585; *Keeton v. Guedry,* 5 Cir. 1976, 544 F.2d 199; *Ford v. Byrd,* 5 Cir. 1976, 544 F.2d 194; *Grundstrom v. Darnell,* 5 Cir. 1976, 531 F.2d 272; *Cheramie v. Tucker,* 5 Cir. 1974, 493 F.2d 586; *cert. denied,* 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107; *Hill v. McClellan,* 5 Cir. 1974, 490 F.2d 859; *Williams v. Sepe,* 5 Cir. 1973, 487 F.2d 913; *McAlester v. Brown,* 5 Cir. 1972, 469 F.2d 1280; *People of Mississippi ex rel. Giles v. Thomas,* 5 Cir. 1972, 464 F.2d 156; *Carter v. Duggan,* 5 Cir. 1972, 455 F.2d 1156; *Collins v. Moore,* 5 Cir. 1971, 441 F.2d 550; *Perkins v. United States Fidelity & Guaranty Co.,* 5 Cir. 1970, 433 F.2d 1303; *Guedry v. Ford,* 5 Cir. 1970, 431 F.2d 660; *Beard v. Stephens,* 5 Cir. 1967, 372 F.2d 685; *Carmack v. Gibson,* 5 Cir. 1966, 363 F.2d 862.

3. We are aware that several commentators have concluded that judges should be protected by only a qualified immunity. *See Pierson v. Ray,* 1967, 386 U.S. 547, 558-67 & n.6, 87 S.Ct. 1213, 18 L.Ed.2d 288 (Douglas, J., dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered,* 65 N.W.U.L. Rev. 615 (1970); Note, *Immunity of Federal and State*

mune, the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid § 1983 claim can be stated. Thus, the district court also properly dismissed the § 1983 claim against the other defendants. *Slavin v. Curry,* 5 Cir. 1978, 574 F.2d 1256; *Perez v. Borchers,* 5 Cir. 1978, 567 F.2d 285; *Humble v. Foreman,* 5 Cir. 1977, 563 F.2d 780; *Hill v. McClellan,* 5 Cir. 1974, 490 F.2d 859; *Guedry v. Ford,* 5 Cir. 1970, 431 F.2d 660. With the federal claim dismissed, of course, the district court did not err in dismissing the pendent state claim.

AFFIRMED.

Judges from Civil Suit—Time for a Qualified Immunity?, 27 Case W. Res. L. Rev. 727 (1977); Comment, *Charity Begins at Home: Judicial Immunity in Iowa,* 58 Iowa L. Rev. 197 (1972); Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L. J. 322 (1969). *See also* Brazier, *Judicial Immunity and the Independence of the Judiciary,* 1976 Pub. Law 397; Judge, Schirott & Bliss, *Judicial Immunity Under the Civil Rights Act: Here Come the Judge's Defenses,* 7 John Marshall J. Prac. & Proc. 213 (1974); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983,* 8 Rutgers-Camden L. J. 65, 69-82 (1976).

Sidney A. SPARKS, R. L. Lynd, d/b/a
Sidney A. Sparks, Trustee,
Plaintiffs-Appellants,

v.

DUVAL COUNTY RANCH
COMPANY, INC., et al.,
Defendants-Appellees.

No. 77-1249.

United States Court of Appeals,
Fifth Circuit.

Oct. 22, 1979.

In an action brought under the 1871 Civil Rights Act against a former state court judge and others, the United States District Court for the Southern District of Texas, at Corpus Christi, Owen D. Cox, Jr., dismissed the complaint, and plaintiffs appealed. The Court of Appeals, 588 F.2d 124, affirmed. On reconsideration en banc, the Court of Appeals, Gee, Circuit Judge, held that coconspirators act under color of law and can be sued for damages in an action brought under the Civil Rights Act of 1871 when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme.

Affirmed in part and reversed in part.

Coleman and Ainsworth, Circuit Judges, with whom Roney, Circuit Judge, joined, filed a dissenting opinion.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

GEE, Circuit Judge:

We consider this case en banc to review the holding of our panel that private citizens, in conspiring with a state judge, did not conspire with any person against whom a claim valid under 42 U.S.C. § 1983 could be stated and thus themselves were entitled to dismissal of claims made against them under that statute. The panel, like the district court, acted under constraint of our prior opinions, opinions that it could not properly overrule. We can and do.

[1] The material allegations in this case are set out in the panel opinion, 588 F.2d 124, 5 Cir., and we restate only those necessary to an understanding of our present holding.[1] It is asserted that state judge O. P. Carrillo conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to grant, prohibiting plaintiffs from producing certain oil. It is

---

* Judges Johnson, Garza, Henderson, Reavley, Politz, Hatchett, Anderson and Randall did not participate in the consideraton of or decision in this case. The case was taken under submission by the court en banc on June 5, 1979.

1. The allegations set out in the panel opinion and partially restated here are merely the unproven assertions of the complaint that must be taken as true in the posture of this case, the complaint having been dismissed for failure to state a claim upon which relief could be granted even if the allegations proved true.

claimed that one of the defendants, Manges, bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. Carrillo was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed. *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Under the authority of a line of cases,[2] commencing in 1970 with *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970), the private defendants obtained dismissal of the complaint's claims against them as well. It is these cases, insofar as they extend a derivative immunity to private persons who conspire with judges, that we overrule today.

We are met at the outset by several technical arguments questioning the propriety of our addressing, and perhaps our power to address, the issue of derivative immunity that we decide today. It is said that the matter was not raised below and, if so, was not properly pleaded; was not raised in briefs to our panel; and was not taken en banc by us within the applicable time limits.

[2] As for the district court pleadings, we have examined them and find the matter sufficiently raised and properly pleaded. Whatever immunity the private defendants derived from Judge Carrillo was a matter of defense for them to plead. It was not necessary that plaintiffs negative this or any other defense in their pleadings. The first amended complaint asserts the existence of a conspiracy in considerable detail; and while we agree that

---

2. *Slavin v. Curry,* 574 F.2d 1256 (5th Cir.), *modified on other grounds,* 583 F.2d 779 (1978); *Perez v. Borchers,* 567 F.2d 285 (5th Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 109, 58 L.Ed.2d 126 (1978); *Humble v. Foreman,* 563 F.2d 780 (5th Cir. 1977); *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974); *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970).

mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss, *Slotnick v. Staviskey,* 560 F.2d 31 (1st Cir. 1977), we think the plaintiffs' pleadings sufficiently stated the facts on which they relied.[3]

[3] We have also examined the briefs to the panel. Appellants show the private party defendants as appellees and certify them as persons interested in the appeal's outcome. The briefs of the two appellees who filed, which were adopted by the other appellees, similarly certify the private party defendants as appellees. There is no question that all knew they were before the court. The issue as stated by appellants was certainly broad enough to cover immunity or want of it in the private parties.[4] And

---

3. Appellee Dennis, for example, complains that the pleadings as to him were insufficient. They were:

> MANGES, knowing that such a bond would be required, had previously arranged for Defendants MARTENS and DENNIS to participate in this conspiracy by signing as sureties on the injunction bond required by law. MARTENS and DENNIS, being aware of the unlawful purpose of the conspiracy and of the roles played by MANGES and CARRILLO therein, did in fact sign such injunction bonds as sureties thereto, which actions in concert with MANGES, CARRILLO, and DCRC, did aid such conspiracy and damage Plaintiffs as hereinafter alleged.

Thus it was alleged that Martens and Dennis participated in the conspiracy, knowing its unlawful purpose as well as the roles of Manges and Carrillo, by performing a specific act to forward the conspiracy. Certainly, in the absence of any motion for more definite statement, this was adequate.

4. Appellants' briefs reads:

> Does the doctrine of judicial immunity render a Complaint subject to dismissal for failure to state a claim upon which relief can be granted when the Complaint alleges a violation of civil rights under 42 U.S.C. § 1983 by a state judge and others acting in concert with him and contains specific, factual allegations of an extra-judicial agreement between the judge and his co-conspirators that the judge would abuse his judicial office for the pecuniary benefit of his co-conspirators and further contains specific allegations of the subsequent abuse of judicial office in furtherance of the conspiracy.

while we agree with appellees that the overwhelming emphasis in the arguments to the panel was on the immunity *vel non* of Judge Carrillo, the brief of Mr. Dennis, the private appellee whose brief was adopted by all others, does assert, albeit perfunctorily, their own immunity deriving from that of Carrillo. Finally, when we took the case en banc on rehearing of the panel's opinion and judgment, there can be no doubt that the appeal remained pending before the court, and we directed all parties' attention to this aspect of the broad issue before us.[5]

[4, 5] Finally, it is asserted that the court somehow lost jurisdiction to hear the cause en banc when no motions for rehearing were filed to the panel and the 21-day period specified for issuance of the mandate by Rule 41, Federal Rules of Appellate Procedure, passed. Even cast in its worst light, that the court lay under a duty imposed by the "shall" language of Rule 41 to issue mandate within that time span, we do not think a failure to perform that duty punctually would deprive the court of jurisdiction. The rule grants us power to shorten or enlarge the specified period by order. This we did by instructions to the clerk to withhold issuance of the mandate. There is

---

5. The letter of our clerk, Mr. Wadsworth, sent by our direction to counsel for all parties, reads in pertinent part:
The issue with which the Court en banc is concerned is that reflected in the holding that:

> Since Carrillo is immune, the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid § 1983 claim can be stated. Thus, the district court also properly dismissed the § 1983 claims against the other defendants.

588 F.2d at 126 [headnote 2]. In other words, the Court wishes to reconsider the holding that Judge Carrillo's alleged co-conspirators—the private citizens—effectively share his immunity, since "they did not conspire with a person against whom a valid § 1983 claim can be stated." *See Stump v. Sparkman*, 1978, 435 U.S. 349, 364 n.13, 98 S.Ct. 1099, 55 L.Ed.2d 331.

no requirement in the rule that such an order be formal, written, or that the parties be given notice of it, though this might be desirable. And even had there been no order, our jurisdiction would not have been affected, though it may be that in a proper case we might have been subject to a peremptory writ. Finally, our power to recall and reform a mandate even after issuance is, though not specifically provided for in the rules, well established, and no motion is required for us to hear or rehear a cause en banc. Rule 35(a), Fed.R.App.P.

Since we find that the issue of the derivative immunity of private persons who conspire with a judge is properly before us, we turn now to the substance of that matter. We begin our inquiry with a recognition that the absolute immunity that judges enjoy exists for the benefit of the judicial system and of the public, not for that of the judge. Only a hero could exercise an unfettered judgment while facing, day after day and case after case, the prospect of personal ruin implicit in permitting every losing party to sue him for damages. There have never been enough heroes to go around, and a sound policy must deal with the prospect that some who occupy the bench may not be of that ilk.

[6] In this imperfect world, however, where even the moon has a dark side, this manifestly necessary policy has the unfortunate effect of insulating not only the robe, but the person within it, from being called to account for actions that may be illegal, even corrupt, as is alleged here. This undesirable side effect of an otherwise valuable prescription can, as to the magistrate himself, be safely mitigated only slightly. All authorities[6] recognize that

---

6. These range from *Bradley v. Fisher*, 13 Wall. 335, 351-52, 20 L.Ed. 646, 651 (1872), to *Stump v. Sparkman*, 435 U.S. 349, 98

when a judge acts in a "clear absence of all jurisdiction" he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend—even successfully—against them. Thus the rule of judicial immunity from damages, with its single, bright-line exception, is as broad as, but no broader than, is necessary.

[7] Even so, the rule is a harsh one, laden with potential for unredressed wrong. As such, its scope should not be extended beyond that necessary to preserve the judge's independence of mind and judgment, for it is upon the manifest necessity to protect these, and on that alone, that the rule rests. When this is clearly seen, it becomes equally clear that no sound policy supports conferring any such immunity on private persons who persuade a judge to exercise his jurisdiction corruptly. Indeed, the thrust of wisdom is to the contrary. Sound policy suggests that attempts by such persons to subvert the judiciary should be penalized in every just way, civil as well as criminal. It suggests that the fullest redress that the judicial system can accommodate while functioning effectively should be granted for such odious wrongs. And it suggests that the actual incentive to corruption held out by the present doctrine, with its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes, should be removed.

S.Ct. 1099, 55 L.Ed.2d 331 (1978). An even earlier formulation of the doctrine in *Randall v. Brigham*, 7 Wall. 523, 536, 19 L.Ed. 285, 291 (1869), that judges "are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, unless . . . the acts, in excess of jurisdiction, are done maliciously or corruptly," was pruned of qualifying language by *Bradley*.

[8] To be sure, the extension of derivative immunity to private persons alleged to have conspired with a judge eliminates one problem. Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by section 1983. Mischievous damage suits of this sort license the ill-disposed to require judges to appear and testify. But the benefit that derivative immunity would accord in protecting judges from an obligation to testify in the trial of their alleged coconspirators, while not wholly illusory, is comparatively insignificant. There already exist many situations in which a judge is amenable to legal process, and these have not proved ruinous to the functioning of the judicial system. For example, we have never held that judges are immune from claims for equitable relief, and both we and the Supreme Court have intimated the contrary. *See Wood v. Strickland,* 420 U.S. 308, 315 n.6, 95 S.Ct. 992, 997 n.6, 43 L.Ed.2d 214 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"); *United Steelworkers of America, AFL-CIO v. Bishop,* 598 F.2d 408, 413 (5th Cir. 1979) (leaving open possibility judge "may be the object of equitable relief in proper cases"); *United States v. McLeod,* 385 F.2d 734, 738 n.3 (5th Cir. 1967) (observing that *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), while holding "that judges are immune from liability for *damages* in suits under 42 U.S.C. § 1983 . . . does not . . . mean that they may not be enjoined from pursuing a course of unlawful conduct"). Nor, of course, does immunity exist for judges under the criminal law or from normal civil process where

a judge happens to be a witness to an incident giving rise to a lawsuit. And habeas proceedings sometimes require the judge's testimony. We therefore doubt that the cause of keeping state judges off our witness stands and in their courtrooms with respect to conspiracy trials is critical to the effective functioning of the judicial system. Moreover, any good conferred by the incremental degree to which the derivative immunity rule might protect state court judges from interruption of their courtroom duties by an obligation to testify seems greatly outweighed by the advantages gained by punishing those who subvert the judiciary, as discussed by us above.

So much, then, for policy, a matter entirely proper for our thorough exploration in view of the judge-made character of the doctrines under examination. We turn next to logical considerations, it being pressed upon us that a derivative immunity for judges' coconspirators follows ineluctably from established concepts, concepts both of state action and of general conspiracy law. As an analytical tool, let us posit the hardest hypothetical case, that of only two conspirators, one a private party and the other a state judge whose judicial order injuring federally protected rights constitutes the sole state action and the only overt act taken or needed to consummate the scheme. Both the conspiracy, since it takes two to conspire, and the section 1983 case, since it requires state action, therefore turn on the judge's involvement. How, as a matter of reason, can either be found to exist, it is asked, when the judge is immune from suit for the damages wrought?

The objection founded in conspiracy law, we conclude, is sustained by neither reason nor authority. Long ago,

in a case involving one alleged to have conspired with foreign diplomats immune even to criminal indictment, we reasoned and held:

> The bill of Particulars furnished by the District Attorney admits that the Japanese persons named in the indictment were "the representatives, officers and agents of the Imperial Japanese Government." The motion to quash, which was overruled on demurrer, states that one was a Commander in the Japanese navy, and the other registered in our Department of State as Assistant Naval Attache of the Japanese Government. We may assume it proven that they were such. It is thereupon argued that they have diplomatic immunity from prosecution, and could not be co-conspirators with Farnsworth so as to constitute a criminal conspiracy. . . . If such persons in the United States join with a citizen of the United States in a conspiracy to commit a crime, though it be conceded that the foreign diplomat would not be indicted in the District Court, or even that he could not be, his immunity will not excuse the local citizen. At least two persons must join in an unlawful enterprise to constitute it a conspiracy. The statute expressly so says. But both need not be prosecuted, or prosecutable. One may die, may escape, or obtain a pardon; but the other remains guilty. It may be that the offense of giving national defense information to a foreign government denounced by Section 32 could not well be committed by representatives of that government who receive it; but even so a person who cannot commit a substantive offense may guiltily conspire with another who can commit it that he do so. *United States v. Rabinowich,* 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211; *United States v. Holte,* 236 U.S. 140, 35 S.Ct. 271, 59 L.Ed. 504, L.R.A. 1915D, 281; *O'Leary v. United States,* 7 Cir., 56 F.2d 515; *Curtis v. United States,* 10 Cir., 67 F.

> 2d 943. The rule that the acquittal of all save one alleged conspirators results in the acquittal of all applies to acquittals on the merits. The reason of it is that such judgments prove that there was in fact no criminal agreement among two or more persons. On the trial of a conspirator there is no technical rule that others must be concurrently or precedently convicted. Nor will personal defenses of the other conspirators not amounting to a total incapacity to commit crime be a defense to him.

Farnsworth v. Zerbst, 98 F.2d 541, 544 (5th Cir. 1938). Unable to improve upon this reasoning or upon the language expressing it, we reaffirm it. Logically, Judge Carrillo's immunity from the damages remedy did not in any manner effect his capacity to conspire, as might have, say, an established condition of insanity. On what is presently before us, he was as able to enter into an agreement, legal or illegal, as any other adult citizen. The same is true of our hypothetical judge whom, since he is our creature, we endow with normal capacities. The objection sought to be grounded in conspiracy law does not bear analysis.

Nor do logic or authority support the objection that, since the sole "state actor" is immune from a damage suit, state action is somehow absent. Indeed, the proposition is so wide of the mark that merely to state it is to reveal its want of logic. In assaying for state action, the question is not at all whether the agent of the state who acts is subject to any particular sanction. Rather, it is whether he has exercised the power of the state in the premises. Both Judge Carrillo and our hypothetical magistrate entered orders deriving their force from state sovereignty. These were state actions, and their character as such is

not impeached in any way by the circumstance that their authors could not be mulcted in damages because of them.

[9] The independence of the issue of state action from the pursuit of specific remedies against state officials is illustrated by *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In that case, the plaintiff, Sandra Adickes, brought suit against *S. H. Kress & Co.* to recover damages under 42 U.S.C. § 1983 for an alleged violation of her constitutional rights under the equal protection clause of the fourteenth amendment. One count of Ms. Adickes' complaint alleged that while serving as a volunteer teacher at a Freedom School for black children in Hattiesburg, Mississippi, she went with six of her students to the Kress store to eat lunch. According to the complaint, after the group sat down at a booth a policeman entered the store and " 'observed [Ms. Adickes] in the company of the Negro students.' " 398 U.S. at 149, 90 S.Ct. at 1604. A waitress then took the orders of the Negro students but refused to serve Adickes because she was a white person "in the company of Negroes." *Id.* Following this refusal of service, Adickes and her students allegedly left the Kress store, and when they reached the sidewalk, the policeman who had previously observed her inside the lunchroom arrested Adickes on what she asserted was a groundless charge of vagrancy. 398 U.S. at 149, 90 S.Ct. 1598. Adickes brought suit only against Kress, a private party, and not against the state or its officials, charging in this count that a Kress employee and a Hattiesburg policeman "reached an understanding to deny [her] service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes." 398 U.S. at 152, 90 S.Ct. at 1605. The Court was plainly untroubled by the

fact that "[t]he involvement of a state official in such a conspiracy plainly provid[ed] the state action essential. . . ." *Id.* But in addition, the Court, discussing the elements of a section 1983 conspiracy between public official and private persons, made clear that a party who was not an official of the state could be liable for damages under section 1983 by virtue of the fact that the private person *himself* acts under color of state law and fulfills the state action requirement of section 1983 actions so long as he is involved in a conspiracy with a state official. The Court declared that

> a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents . . . ."

398 U.S. at 152, 90 S.Ct. at 1605-1606, *quoting United States v. Price,* 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966) (citation omitted). By the same reasoning, coconspirators act under color of law and can be sued for damages in a section 1983 action when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme. It follows that the unavailability of damages as a remedy against either Judge Carrillo or our hypothetical judge has no effect on whether the judges' actions were those of the state such that their coconspirators, too, acted under color of state law when they involved the judge in their conspiracy. The state action requirement for a

section 1983 suit is met, judicial immunity notwithstanding.

The doctrine of a derivative immunity for private persons who conspire with judges can thus be seen to lack foundation in either reason or authority. Accordingly, we abolish it and, to the extent that our cases cited at note 2 above espoused it, we overrule them. We recognize that in doing so we cast away a tool for discouraging possible mischievous lawsuits that, by intention or effect, harass judges for performing their offices. But this tool, like a hot flatiron, is too awkward for service as a cautery and works too much damage to surrounding structures for the small benefit it confers.

Insofar as the judgment below dismissed the claims against Duval County Ranch Co., Inc. and Messrs. Manges, Dennis and Martens, it is reversed, and these claims are remanded for further proceedings. Insofar as it dismisses the claims for damages against Judge O. P. Carrillo, it must be affirmed.

AFFIRMED in part and in part REVERSED.

COLEMAN and AINSWORTH, Circuit Judges, with whom RONEY and HILL, Circuit Judges, join dissenting:

Judges Wisdom, Godbold, and Tjoflat decided this case correctly at the panel level, 588 F.2d 124, 5 Cir. That decision should not now be overturned by the en banc court.[1]

The majority concedes, as it must, that judges are *absolutely* immune to civil damage suits for judicial acts done within their jurisdiction, *Bradley v. Fisher,* 1872, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646. The same absolute immunity applies to state prosecutors, *Imbler v. Pachtman,* 1976, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128.[2]

. . *Bradley v. Fisher, supra,* was a case, in overheated times, growing out of the unsuccessful prosecution of John H. Suratt for complicity in the murder of President Lincoln. We feel that the en banc majority has failed

---

1. Nothing is to be gained by commenting at any great length on the highly strained manner by which our Court has taken this case under its *en banc* wing. The extended apologia at the outset of the majority opinion is comment enough. Suffice it to say, nobody appeared here for any state judge. The sword is now suspended over their heads in a case in which only some, but not all, *private* parties appeared by counsel. If a criminal defendant were to be given this kind of short shrift we undoubtedly would be shrieking that it was "fundamentally unfair"—devoid of the most elementary "due process".

This case ought to be remanded to the docket. Briefs and oral argument ought to be had on behalf of state judges and state prosecutors. *They are the real defendants in this case.*

2. *See, also,* the extensive array of cases cited in the panel opinion, 588 F.2d at 126, footnote 2.

Since *Imbler* held that state prosecutors have the same absolute immunity as judges, the en banc majority necessarily includes them in the net now being devised for judges.

to give full recognition to the teachings of that case. It was there held:

> "[The Judge] cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, *with out apprehension of personal consequences to himself* (emphasis added). Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the posession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."

80 U.S. at 347.

The High Court not only said that the judges are immune to suits for pecuniary damages. The Court said that a judge shall be free to act "without apprehension of personal consequences". Being dragged through a civil suit among private individuals in which the judge's integrity is the indispensable jurisdictional issue cannot be anything but a personal consequence which the *en banc* majority now allows in contravention to *Bradley*.

Bradley went on to hold that the purity of judicial motives, even judicial corruption, cannot be the subject of judicial inquiry in a civil suit. It noted that:

> "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the

> acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

80 U.S. at 348.

Bradley was recently reaffirmed in *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). It was argued in *Stump* that the judge should be denied immunity "because of the tragic consequences of [his] actions", 98 S.Ct. at 1108, but the Supreme Court reaffirmed that a judicial officer should be free of " 'apprehension of personal consequences to himself' " [citing *Bradley*], 98 S.Ct. at 1108.

We believe that judges may not be attacked collaterally in a damage suit among private parties where, as in a § 1983 case, jurisdiction depends on the establishment by a preponderance of the evidence that the judge acting within his jurisdiction nevertheless acted conspiratorily and corruptly.

There is no merit in the argument that in the case presently before us the judge is not a party defendant. The functions of his office and his performance therein are indispensably necessary to the continuation of the action. To say that he is not being sued is a pretense.

What the en banc Court is doing here is to abrogate state judicial or prosecutorial immunity if the plaintiffs allege a conspiracy under a § 1983 cause of action.

Although they cannot be sued directly, this en banc opinion allows state judges and state prosecutors to be sued *indirectly,* seriously breaching absolute judicial immunity. We must dissent.

The destruction of many a massive dike began with a very small leak. Jurisprudentially, this is just such a case, and the newly announced doctrine has been reached without precedent to support it; indeed, the majority summarily overrules prior precedents—"*We can and we do*" (emphasis added). By this indirection the Court now plants a land mine under every state judge and prosecutor in this Circuit, to be detonated at the whim and caprice of any unhappy state court litigant. And it makes no difference, apparently, that such litigants in meritorious cases have available state remedies against the private defendants.

The majority asserts [slip opinion p. 545] that this unprecedented step is mandated by the need to deal with "unredressed wrong", but that protestation cannot stand examination. There is not the slightest hint that *damage suit* redress was unavailable under Texas law against the private defendants.[3]

---

3. The panel opinion pointed out, 588 F.2d at 125, that the Texas Court of Civil Appeals dissolved the allegedly corrupt injunction involved in this case; moreover, the judge who issued it has been removed from the bench. We would be surprised to learn that the jurisprudence of Texas is so deficient that the damages available under 42 U.S.C. § 1983 are unavailable under Texas law against the private individuals guilty of the kind of conspiracy alleged here.

It has been said, however, that rights guaranteed by Texas law are "no good in Duval County". Conditions in *one county* in six states cannot possibly justify abrogation of the absolute immunity of hundreds of judges and prosecutors who have absolutely nothing to do with what goes on in Duval. Verily, the hair on the tail is now to be allowed to wag the dog.

The majority concedes [slip opinion p. 545] that "[e]very trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge . . . acted in knowing concert to deny federal rights protected by § 1983".

That is exactly the fatal defect in this majority decision, and it should have been recognized that state prosecutors are also being shoved off the ledge.

In seeking, quite lamely we think, to minimize the impact of what is being done here, the majority opines that the obligation of a judge to testify in such cases "is comparatively insignificant", as if this were the only danger to which judges and prosecutors are now about to be subjected. But this is a very small portion of the iceberg.

If there is anything a judge ought to prize and that the public demands, it is his *judicial integrity*. It is commonly accepted that a judge must not only avoid evil but he must avoid even the appearance of it. Under this decision any state judge or any state prosecutor may have that integrity besmeared by any individual who has lost a case and who knows how to *charge* enough misconduct to withstand a motion to dismiss, however without merit the complaint may be.

The Supreme Court has consistently recognized the existence of an interest in reputation which cannot be infringed without the invocation of due process requirements. The Court articulated this principle most clearly in *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), by asserting that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to

him, notice and an opportunity to be heard are essential". *Id.* at 437, 91 S.Ct. at 510. The High Court reaffirmed this concept in *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), requiring a hearing for students suspended from high school. The Court noted that the charges of misconduct upon which the suspensions were based "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment". *Id.* at 575, 95 S.Ct. at 736. *See, also, Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Court in rejecting the claim for a due process hearing noted that this would be a "different case" if the State had made charges against the plaintiff which "might seriously damage his standing and association in his community".

In *Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), the Court recognized that an allegation that the plaintiff, a trainee policeman, had attempted to commit suicide, if false, would place such a stigma upon the plaintiff's reputation that due process procedures would be required under the Fourteenth Amendment.

In suits such as that now allowed by the majority for the first time in the history of this Court, how can the judge or the prosecutor defend himself? He is not a party defendant, so he is not entitled to trial participation as a party litigant. He might arrange active participation by surrendering the cornerstone of his judicial independence in a motion to intervene as a defendant. If he goes to that extreme (which if consistently followed would greatly harm the judiciary as an institution) he

most likely would have to employ counsel, presumably at his own expense, suffering the consequent pecuniary punishment, if nothing else.

If the judge or the prosecutor does not become a party defendant, how can he guarantee himself the right to testify in behalf of his vindication? Who will call him as a witness? Who will examine and cross-examine witnesses? Could he ask for jury instructions? Would he be allowed to make an argument to the jury? Must the judge stand helpless while the most vital need and the most precious possession of the judiciary is damaged, possibly destroyed, by *private parties* to a *private* damage suit *which could not have been brought directly against him?*

Does our jurisprudence contemplate that in those cases where a judge has absolute immunity to a suit for money damages he may nevertheless have his judicial character and reputation irreparably splotched by a verdict from six jurors in a suit to which he could not have been made a party? We do not think so.

Although the majority *attempts* it, are judges to be equated with agents of foreign powers? Are judges to be equated with policemen who have only qualified immunity?

Neither do we consider the necessity for a state judge or prosecutor to appear as a witness in a private suit for money damages to be as inconsequential as the majority appraises it. Cases have a way of being delayed for a long time, continued from time to time. The state judge or prosecutor may have an important case which demands speedy attention. At the beck and call of private litigants he is immobilized, or, at least, forced into delays which may hamper justice.

THIS OPINION VIOLATES FEDERAL PRINCIPLES

Although the considerations already stated should be enough to affirm the dismissal of this complaint, there is a far more serious reason for not invading the absolute judicial immunity of state judges and state prosecutors.

Regardless of how diligently we may try to avoid the issue, the cold fact is that this decision makes state judges and state prosecutors *personally* answerable in federal court to private litigants for their state judicial or prosecutorial acts.

Of course, the legal correctness of such judicial actions may be reviewed as to federal constitutional questions in a number of ways, but the point is that in those instances the *legal merits* of the action are being reviewed, a matter of no *personal* consequence to the judge or prosecutor as to how the case may ultimately turn out.

MAJORITY RATIONALE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

Not only is the en banc opinion of this court harmful to basic policies underlying judicial immunity and insensitive to the delicate balance between state and federal courts, it is also contrary to what has been the clear weight of authority in the Federal Courts of Appeals. With the exception of the First Circuit,[4] all Circuit Courts that have explicitly considered the question have concluded that a private defendant cannot be held liable under

---

4. *Slotnick v. Staviskey*, 1 Cir. 1977, 560 F.2d 31, *cert. denied*, 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978); *Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno*, 1 Cir., 1976, 547 F.2d 1.

§ 1983 for conspiring with a state actor if the state actor himself is immune.[5]

The cases enunciating this rule begin with the Ninth Circuit's oft-quoted decision in *Haldane v. Chagnon,* 9 Cir., 1965, 345 F.2d 601. In *Haldane,* plaintiff charged that two judges of the Superior Court of California, the bailiff of one of the judges, and two licensed attorneys were involved in a broad-based conspiracy to deny him various constitutional rights. The Ninth Circuit reaffirmed the lower court's order of dismissal against the judges and the bailiff on the ground of judicial immunity. It then affirmed the dismissal as to the attorneys with the following language:

---

5. See, e. g., *Hazo v. Geltz,* 3 Cir. 1976, 537 F.2d 747; *Guedry v. Ford,* 5 Cir. 1970, 431 F.2d 660; *Kurz v. Michigan,* 6 Cir., 1977, 548 F.2d 172; *Hansen v. Ahlgrimm,* 7 Cir., 1975, 520 F.2d 768; *Haldane v. Chagnon,* 9 Cir., 1965, 345 F.2d 601.

The position of the Seventh Circuit is presently somewhat unclear, following the highly fractionated en banc opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979. The per curiam opinion in that case affirmed the district court's dismissal of a § 1983 conspiracy against private defendants after the state actor (a judge) was held to be immune from suit. Four concurring opinions were filed along with the per curiam order. Two judges wrote that the question of whether a § 1983 suit may be brought when the state actor is immune was not properly before the court. *Id.* (Pell, J., and Bauer, J., concurring). Three judges, on slightly divergent rationales, would allow § 1983 suits even when the state actor is immune, provided the plaintiff meets the burden of a particularized pleading requirement. *Id.* (Fairchild, C. J., concurring), (Sprecher, J., concurring) (Tone, J., concurring).

Two cases from the Second and Third Circuits contain language broad enough to negate the rule stated in the text; i. e., that a private actor cannot be held liable for conspiracy under § 1983 if the state actor is immune. *Jennings v. Shuman,* 3 Cir., 1977, 567 F.2d 1213; *Fine v. New York,* 2 Cir., 1975, 529 F.2d 70. However, these cases, which state generally that a private citizen can be liable under § 1983 if he conspires with a state official, never explicitly considered the question of whether the private actor is liable when the state actor is immune from suit.

> With the elimination of the defendant judges and bailiff from the case, claims against the defendant attorneys under the Civil Rights Act cannot be stated. The attorneys were not State officers, and they did not act *in conspiracy with a State officer against whom appellant could state a valid claim.* It follows that they did not, and could not, commit the alleged wrongful acts "under color of state law or authority"; hence, they are not subject to liability under the Civil Rights Act." *Id.* at 604, 05. (Emphasis added).

The Ninth Circuit has adhered to this rule in the recent cases of *Sykes v. Department of Motor Vehicles,* 9 Cir., 1974, 497 F.2d 197; and *Briley v. California,* 9 Cir., 1977, 564 F.2d 849.[6]

In addition to the Ninth Circuit, the same rule has been adopted by the Third,[7] Sixth, and Seventh Circuits.[8] *See,*

---

6. Note that Judge Choy's opinion in *Briley* refers to the holding in *Haldane* as "dicta." 564 F.2d at 858 n. 10. Classifying the *Haldane* rule as "dicta", however, is dubious at best. The holding that private parties cannot be liable under § 1983 when the state actor is immune from suit was necessary to the Ninth Circuit's affirmation of the lower court's disposition in *Haldane* and that ruling is certainly not "dicta". *Haldane v. Chagnon,* 9 Cir., 1965, 345 F.2d 601.

7. The recent case of *Jennings v. Shuman,* 3 Cir., 1977, 567 F.2d 1213, has been cited for the proposition that the Third Circuit has abandoned the majority rule. However, a careful reading of that case demonstrates that the court was not presented with the question of whether a private defendant can be held liable under § 1983 when the state actor is immune from suit. *See Hazo v. Geltz,* 3 Cir., 1976, 537 F.2d 747; *Waits v. McGowan,* 3 Cir., 1975, 516 F.2d 203.

8. As noted in footnote 5, the current position of the Seventh Circuit is somewhat uncertain due to the recent en banc opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979. The per curiam opinion in that case affirmed the lower court's dismissal of § 1983 conspiracy charges against the private defendants after the state was held immune from suit. Whether this result was reached based on the Seventh Circuit's earlier adoption of the majority rule, *Hansen v. Ahlgrimm,* 7 Cir., 1975, 520 F.2d 768; *French v. Corrigan,* 7 Cir.,

e. g., Hazo v. Geltz, 3 Cir., 1976, 537 F.2d 747; *Waits v. McGowan,* 3 Cir., 1975, 516 F.2d 203; *Kurz v. Michigan,* 6 Cir. 1977, 548 F.2d 172; *Hansen v. Ahlgrimm,* 7 Cir., 1975, 520 F.2d 768; *French v. Corrigan,* 7 Cir., 1970, 432 F.2d 1211; *Brown v. Dunne,* 7 Cir., 1969, 409 F.2d 341. *See also Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979.

In the Fifth Circuit, the above rule has been firmly established since the 1970 case of *Guedry v. Ford,* 5 Cir., 1970, 431 F.2d 660. After *Guedry,* the rule has been followed in *Slavin v. Curry,* 5 Cir., 1978, 574 F.2d 1256, modified on other grounds, 583 F.2d 779; *Perez v. Borchers,* 5 Cir., 1978, 567 F.2d 285; *Humble v. Foreman,* 5 Cir., 1977, 563 F.2d 780; and *Hill v. McClellan,* 5 Cir., 1974, 490 F.2d 859. A rule of law so firmly established should not be lightly overturned.

Detractors of the rule argue that, however, firmly established, there was never an adequate rationale to sustain it, and in any event it cannot withstand rigorous analysis. We refute such contentions.

The policy rationale supporting the rule should be self-evident to anyone familiar with the burgeoning number of § 1983 suits and aware of the impact of this phenomenon on our federal judicial system. Today's opinion alters dramatically the relationship between state and federal courts. Henceforth, anyone dissatisfied with the result of litigation in state court can allege a "con-

---

1970, 432 F.2d 1211, or upon a new rule that the conspiracy was not alleged with sufficient particularity is difficult to ascertain. *See Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979 (Fairchild, C. J., concurring), (Pell, J., concurring), (Sprecher, J., concurring), (Tone, J., concurring).

spiracy" sufficient to obtain federal court review of his claim.[9] As one court put it:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'
>
> "This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties. If in circumstances such as this defendants may be made to answer for their determinations, not only would the independence of the judiciary be undermined, but a ready means would be at hand to paralyze the entire judicial system."

French v. Corrigan, 7 Cir., 1970, 432 F.2d 1211, 1213-14 (quoting *Morgan v. Sylvester,* D.C., 125 F.Supp. 380, *aff'd,* 2 Cir., 220 F.2d 758, *cert. den.,* 350 U.S. 867, 76 S.Ct. 112, 100 L.Ed. 768).

Judge Sprecher, in his concurring opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261 at 267, 1979, sets

---

9. As noted by the majority: "Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by section 1983." Majority Opinion slip opinion at p. 545.

forth quite clearly the policy considerations supporting the rule now abandoned by this court:

> The first is that frivolous civil rights actions should be discouraged. Second, the federal courts, under the guise of civil rights, should not monitor and furnish a remedy for each losing party in every state court proceeding, particularly when the state merely furnishes the forum, has no interest in the outcome, and the state judge does no more than preside over a case presented to him by performing discretionary acts, judicial functions and the normal duties of his office. Third, private persons who are victims of, or witnesses to, a crime should not be discouraged from reporting the crime or from following the advice of a prosecuting attorney as to whether to lodge a formal complaint against, or to appear as a witness against, the perpetrator. Similarly, in civil matters, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before embarking upon activities of ambiguous legality. This is particularly important since it can be presumed that if the action is unconstitutional the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. Fourth, permitting conspiracies to be claimed which include immune judges may expose a judge to the time-consuming effort and chilling effect of submission to discovery and the appearance as a witness. Finally, if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to costly attack for participating in the same activity as the judge.[10]

---

10. Judge Sprecher also lists policy considerations militating for the rule adopted en banc by a majority of this court:

> There are of course other policy arguments favoring recovery from private co-conspirators. If a judge should, for example,

Today's majority opinion spends little time with such policy considerations. The opinion notes that "[m]ischievous damage suits of this sort license the ill-disposed to require judges to appear and testify," but concludes that any such burden will be "comparatively insignificant." Majority Opinion slip opinion at p. 545. Once having given this slight nod toward the policy problems inherent in its holding, the majority spends the rest of its time demonstrating that its decision is analytically palatable.

We doubt that the practical impact of this decision properly may be termed as "comparatively insignificant." Today's decision affords an opportunity for state prisoners possessing sufficient pen and ink to allege a conspiracy between a judge, a prosecutor, and "whatever other participants the pleader's fancy may light upon." Majority Opinion slip opinion at p. 545. If the petitioner can drum up sufficient allegations to withstand a motion to dismiss, he can now effectively hail a state judge or prosecutor

---

accept a bribe for performing a judicial act which deprives a person of constitutional rights or should reach an express understanding with another person to violate the constitutional rights of a third person, a remedy should exist against the briber or conspirator regardless of the judge's immunity. It would be illogical to dispense immunity to state actors and then extend that immunity to private persons conspiring with them, narrowing civil rights relief to direct state action only. Civil rights cases should be disposed of by case-to-case attention and not swept away by broad *per se* immunity. If in any particular case competing policy considerations exist, the federal court should be able to balance all such considerations in reaching its result. *Sparkman v. McFarlin*, 7 Cir., 601 F.2d 261 at 267, 1979.

Judge Sprecher, for his part, favored abolishing the immunity rule. In its place, he suggested a rule requiring particularized pleading of § 1983 conspiracy claims. This solution, which seeks to avoid a barrage of conspiracy actions, creates difficulties of its own—the particularized pleading requirement runs contrary to the general federal philosophy of notice pleading.

before federal court in the course of suing "private" parties.

The history of cases in our own Circuit should be instructive as to the probable impact of the majority's decision on the flow of prisoner appeals to this court. Of the five cases in this Circuit cited earlier as applying the immunity rule, four were brought by incarcerated or indicted plaintiffs. *Slavin v. Curry,* 5 Cir., 1978, 754 F.2d 1256, modified on other grounds 583 F.2d 779; *Perez v. Borchers,* 5 Cir., 1978, 567 F.2d 285, *Humble v. Foreman,* 5 Cir., 1977, 563 F.2d 780; *Hill v. McClellan,* 5 Cir., 1974, 490 F.2d 859.

Apparently the majority is, in fact, aware of the potential its opinion has for opening the door to frivolous conspiracy claims. Somewhat off-handedly the opinion states that "mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss." Majority Opinion slip opinion at p. 543, at p. 5. Thus, the court may be imposing a strict pleading requirement upon § 1983 conspiracy actions, in order to avoid a barrage of groundless claims. Indeed, at least one judge in the Seventh Circuit has suggested that abolishing the immunity rule and replacing it with a "particularized pleading" rule is the proper solution to the present quandary.[11]

A particularized pleading requirement, however, is at odds with a basic policy underlying federal civil procedure —notice pleading. See Rule 8, Federal Rules of Civil Procedure.

---

11. *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979 (Sprecher, J., concurring).

Furthermore, erecting a pleading barrier between the courtroom and ungrounded lawsuits is likely to be an unsatisfactory means of avoiding frivolous litigation, since persons disposed to bring such litigation would probably have little difficulty explicating their alleged grievances with particularity.

The majority is seemingly unaware of the inroads it has made into the doctrine of judicial immunity, or of the impact its decision could have on the respective roles of state and federal courts. "All authorities," the majority states, "recognized that when a judge acts in a 'clear absence of all jurisdiction' he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend—even successfully—against them." Majority opinion slip opinion at p. 545.

In our view it is unwise to encroach upon the robe's immunity. The court now abandons a rule of law that has served this and other Circuits well for over a decade, and replaces it with a formulation corrosive to the doctrine of judicial immunity, harmful to the proper functioning of our federal system, and fraught with the possibility of providing the means for frivolous litigation.

We suggest that this decision will not be the last word on this subject and we respectfully dissent.

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 19

No. 77-1249

D. C. DOCKET NO. CA-76-C-2

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs-Appellants,

versus

DUVAL COUNTY RANCH COMPANY,
INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

---

* Judges Johnson, Garza, Henderson, Reavley, Politz, Hatchett, Anderson and Randall did not participate in the consideration of or decision in this case. The case was taken under submission by the Court en banc on June 5, 1979.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that appellants recover their costs on appeal from the appellees, except appellee O. P. Carrillo, who shall recover his costs from the appellants.

October 22, 1979

Coleman and Ainsworth, Circuit Judges, with whom Roney, Circuit Judge, joins, dissenting.

ISSUED AS MANDATE:

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 77-1249

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs-Appellants,

versus

DUVAL COUNTY RANCH COMPANY,
INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For The Southern District of Texas

ON PETITION FOR REHEARING

(December 14, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

---

* Judges Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Sam D. Johnson, and Tate did not participate in the consideration of or decision in this case. The case was taken under submission by the Court en banc on June 5, 1979.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Orville E. Dennis in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS GIBBS GEE
United States Circuit Judge